91-1323

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

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THE SUPREME COURT OF OHIO

1991 TERM

To wit: November 13, 1991

State of Ohio, Appellee,	:	Case No. 91-1600
v.	:	E N T R Y
Calvin O. Burney, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58611)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 58611

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	
-vs-	:	JOURNAL ENTRY
	:	AND OPINION
CALVIN O. BURNEY	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JUNE 6, 1991
CHARACTER OF PROCEEDING	:	Criminal Appeal from Common Pleas Court No. CR-238069
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION:		_____

APPEARANCES :

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APPENDIX "B"

MATIA, P.J.:

In the instant case, defendant-appellant, Calvin Burney, appeals the verdict of the Cuyahoga County Court of Common Pleas which found Burney guilty of drug trafficking pursuant to R.C. 2925.03, R.C. 2925.13, R.C. 2925.11, R.C. 2923.12 and R.C. 2923.24. In his timely appeal, appellant argues that the court violated his statutory right to a speedy trial, the sufficiency of the evidence and the trial court erred in its jury instruction in the re-indictment which gave rise to these charges.

I. THE FACTS, GENERALLY

The drug incidents occurred on November 6, 1987 and November 13, 1987. On both dates, police

detectives, pursuant to an on-going investigation which involved a joint task force operation between ATF agents and the Cleveland Police Department Narcotics Unit (Tr. 78), observed appellant and his brother and co-defendant, Mitchell Burney conduct drug transactions.

On November 6, 1987, the investigation team permitted appellant Calvin and co-defendant Mitchell to sell one ounce of cocaine to Special Agent Ron Carter without an arrest. The surveillance team monitored the body wire worn by Agent Carter, (Tr., 83-84).

On November 13, 1987, Agent Carter again prearranged a drug buy with William Atkinson (the middle man). Agent Carter went to Atkinson's

residence at 3340 East 113th Street. (Tr., 95.) Once there, Atkinson told Agent Carter "*** he had good news and bad news for me. He stated the bad news was that there was only going to be three ounces of cocaine, instead of four, because his sources didn't have time to go to the stash house. He stated that the good news was that it would still be $1,200.00 an ounce, that we wouldn't have to go anywhere, that the transaction would take place there." (Tr. 95).

Agent Carter was at Atkinson's address for one and one-half hours. During this time, Atkinson made phone calls and paged his suppliers to hurry the deal. (Tr. 126.)

Agent Carter was paged by his office and told to leave the

residence. As he was leaving, the police units converged on the residence and arrested Atkinson, Carter and Carter's informant. (Tr. 99.)

Prior to these events, the white BMW containing appellant Calvin and co-defendant Mitchell Burney was being observed by the other members of the task force. The BMW was stopped by the task force at 116th Street and Melba, three blocks from Atkinson's residence on 113th Street. Appellant Calvin, who was driving, attempted to back the BMW out of the blockade and had to be ordered to stop. (Tr. 275-276.)

A loaded nine millimeter Browning automatic pistol was found between the front seats. (Tr. 277.) Three ounces

cocaine was confiscated from the pocket of co-defendant Mitchell. A pager was found on appellant Calvin. The pager had a liquid crystal display and William Atkinson's phone number was stored as the most recent caller. (Tr. 287, 288.)

II. THE CASE

The appellant was initially indicted December 28, 1987 in Cuyahoga County Court of Common Pleas, criminal case number CR-222830, for events which occurred on November 6 and 13, 1987.

Appellant Burney was arraigned on this initial indictment on January 26, 1988. On July 6, 198, appellant waived his right to speedy trial. A motion to suppress evidence was filed on August 10, 1988, and was heard and

overruled on April 4, 1989. Trial scheduled on March 29, 1989 was continued at both parties request until April 19, 1989.

On April 17, 1989, a second indictment was returned by the grand jury. The charges were raised from drug abuse to drug trafficking. On May 4, 1989, appellant entered a "plea in bar" based on denial of a speedy trial. On May 8, 1989, appellant was arraigned.

A jury trial was commenced on August 14, 1989. On August 25, 1989, the jury returned a verdict of guilty as to all counts and the gun specification.

On September 14, 1989, the trial court sentenced appellant to serve a term of three years to fifteen years.

All terms were to run concurrent.

On October 2, 1989, the initial indictment was dismissed as the result of a nolle prosequi.

On October 13, 1989, appellant brought this timely appeal from the within verdict and sentence.

III. ASSIGNMENT OF ERROR NO. I

> "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE CHARGES THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS STATUTORY RIGHT TO SPEEDY TRIAL UNDER R.C. 2945.71 AND 2945.73."

Appellant, in his first assignment or error argues that the trial court erred in denying his motion to dismiss the second indictment. Specifically, appellant

argues that his waiver of his right to a speedy trial of the initial indictment did not constitute a knowing and intelligent waiver of such right as to the second charge.

This assignment of error is not well taken.

ISSUE: WHETHER SPEEDY TRIAL WAIVER AS TO THE ORIGINAL CHARGE CAN BE CONSIDERED AS A KNOWING AND INTELLIGENT WAIVER AS TO THE SECOND CHARGE

Appellant Burney correctly relies on State v. Adams (1989), 43 Ohio St. 3d 67 to assert his contention that he did not waive his right to a speedy trial as to the second indictment arising out of the same facts handed down on April 17, 1989 by the Grand Jury. The Ohio Supreme Court held in Adams, "Nevertheless, we hold that when an accused waives the right to a

speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." Adams, supra at 70.

The court reasoned that the appellant's waiver of his right to a speedy trial as to the original indictment could not be construed as a knowing and intelligent waiver to a new charge that could involve different defenses at trial. The court stated: "Thus, a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the nature of the crime he is charged with." Adams, supra. Therefore, applying the court's logic to the

issue of speedy trial waiver, herein, the original waiver does not apply to the subsequent re-indictment charges.

ISSUE: WHETHER APPELLANT WAS BROUGHT TO TRIAL WITHIN 270 DAYS

R.C. 2945.71(C) provides in relevant part:

"A person against whom a charge of felony is pending:

"***

"(2) shall be brought to trial within two hundred seventy days after his arrest."

Appellant Burney was arrested on November 13, 1987. He was brought to trial on charges resulting from the new charges on August 14, 1989. Approximately 630 days elapsed between the date of appellant's original arrest and the date of his trial arising from the second indictment. This clearly exceeds the statutory intent of R.C. 2945.71(C) unless R.C.

2945.72 tolls the time.

Thus, next we must examine whether that time was extended (tolled) for any reason pursuant to R.C. 2945.72.

"R.C. 2945.72 provides:

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only be the following:
>
> "***
>
> "***
>
> "(D) Any period of delay occasioned by the neglect or improper act of the accused;
>
> "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;
>
> "****
>
> "(H) The period of any

continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;

"***."

ISSUE: THE FACTS RE ANY AND ALL TRIAL DELAYS WHATSOEVER

The record indicates that on February 9, 1988, the pretrial was reset to February 17, 1988. Then again on February 22, 1988, pretrial was reset again until March 18, 1988. However, the record does not indicate whether these continuances were made at the defendant's request, so in effect, these entries will not toll the time.

However, on August 10, 1988, defendants filed a motion to suppress evidence. The court ruled on this motion on April 4, 1989. Herein 234

days were tolled at defendant's request. Trial scheduled on March 29, 1989 was continued for April 19, 1989 at the request of both the prosecutor and defense. Therefore, an additional 21 days was tolled at the defendant;s request.

On May 4, 1989, defendant made a plea in bar for a motion to dismiss for lack of speedy trial waiver. The court ruled on this motion on August 28, 1989. Consequently, 114 days were tolled for the within motion.

Historical Date and Activity	Elapsed Chargeable Time
1) November 13, 1987 - appellant arrested and incarcerated in lieu of bond	
2) November 16, 1987 - appellant released on bond	2 x 3 = 6 days
3) August 10, 1988	

- appellant filed a motion to suppress

4) April 4, 1989 - court denied motion to suppress — 234 days

5) March 29, 1989 - trial continued at defendant's and prosecutor's request to April 19, 1989 — 21 days

6) May 4, 1989 - appellant made a plea in bar for motion to dismiss for lack of speedy trial waiver

7) August 28, 1989 - trial court denied motion to dismiss — 114 days

TOTAL ELAPSED CHARGEABLE TIME 375 days

ISSUE: APPELLANT WAS NOT DENIED RIGHT TO SPEEDY TRIAL

The aggregate number of days tolled at defendant's request for these motions and continuances were 375, thus extending the statutory period. See, State v. Bickerstaff (1984), 10 Ohio St. 3d 62, 67. (Therefore, the time that elapsed

while the motions were pending is not included for purposes of R.C. 2945.71.) When these continuances and motions are subtracted from the total aggregate number of days, which is 630; the resulting days equal 255 and fall within the permissible statutory period of 270 days.

Accordingly, although appellant applies State v. Adams, supra, correctly, when this court extends the statutory time pursuant to R.C. 2945.72, the actual time pending before appellant was brought to trial falls within the statutory limits of R.C. 2945.71.

Accordingly, assignment of error I is without merit.

IV. ASSIGNMENT OF ERROR NO. II

"THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO

SUSTAIN APPELLANT'S CONVICTION FOR TRAFFICKING IN DRUGS, R.C. 2925.03(A)(7) AND POSSESSION OF DRUGS GREATER THAN THREE TIMES THE BULK ON NOVEMBER 13, 1987."

Appellant, in his second assignment of error argues that there was insufficient evidence to sustain his conviction for trafficking in drugs, R.C. 2925.03(A)(7) and possession of drugs greater than three times the bulk on November 13, 1987. Specifically, appellant argues that the evidence shows only that he was driving an automobile with his brother as a passenger, and that there is no evidence that he knew that his brother had cocaine in his possession.

This assignment of error is not well taken.

ISSUE: WHETHER SUFFICIENT EVIDENCE SUSTAINS CONVICTION

The standard for reviewing a conviction based upon the sufficiency of the evidence is found in the syllabus of State v. DeHass (1967), 10 Ohio St. 2d 230:

> 1. On the trial of a case either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.
>
> 2. A reviewing court may not reverse a judgment of conviction in a criminal case where the record shows that a verdict of guilty was returned by a jury on sufficient evidence and where no prejudicial error occurred in the actual trial of the case or in the instructions given the jury by the court.

Herein, a review of the record supports the trial court's decision that there was sufficient evidence to sustain the trafficking and possession

conviction of appellant.

As to appellant's activities of November 13th, 1987, the jury heard evidence that the habitual operator of the white BMW leased by his sister when she was out of town working (Tr. 89.) The jury further heard from appellant himself that the nine millimeter Browning pistol and the pager were his property. (Tr. 772, 782.) Mitchell Burney testified that Calvin's pager went off during the drive in the BMW prior to their arrest on the 13th. (Tr. 709, 736-737.) Special Agent Carter testified that at about the same time on the 13th, he was in the presence of Atkinson who called a paging company to have his suppliers paged, and that (middle man) Atkinson specifically told him what he

was doing while he did it. (Tr. 126.) Detective Zaller testified that at the scene of the arrest on the 13th, the pager taken from Calvin Burney had Atkinson's phone number stored as the most recent caller. (Tr. 287-288.) Zaller also testified that appellant tried to flee the police blockage on the 13th. (Tr. 275.)

Appellant testified that he had the gun because he was going to purchase macaroni salad for his fish store and denied the pager contained Atkinson's phone number. (Tr. 754 and 782.)

Accordingly, the trier of fact in this case, the jury, had before it sufficient evidence to support a conviction for drug trafficking and possession beyond a reasonable doubt.

An appellate court will not reverse a judgment of conviction where the record shows that a conviction was based upon sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230.

Accordingly, assignment of error II is without merit.

V. ASSIGNMENT OF ERROR NO. III

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE CONTAINED WITHIN R.C. 2923.12 (C)(1)."

Appellant, in his third assignment of error, argues that the trial court erred in failing to instruct the jury on the affirmative defense contained within R.C. 2923.12 (C)(1). Specifically, appellant argues that he was carrying a concealed weapon for a lawful business purpose.

This assignment of error is not

well taken.

ISSUE: WHETHER APPELLANT WAS ARMED FOR A LAWFUL BUSINESS PURPOSE AT THE TIME AND PLACE OF ARREST

The justification for carrying a concealed weapon must be measured by the facts and circumstances as they existed at time of the arrest ***." State v. Johnson (Montgomery Cty. 1972), 31 O. Misc. 145, 60 O.O. 2d 301, 283 N.E. 2d 452.

Appellant's assertion of the affirmative defense contained in R.C. 2923.12(C)(1) is that he possessed the nine millimeter Browning pistol for the opening and closing of his lawful fish store business. Assuming this to be a true assertion, appellant cannot use this reason to justify his gun possession in the middle of the afternoon miles away from his store.

Therefore, the trial court correctly held that the reason the affirmative defense would not be given to the jury was that the evidence did not "*** raise the facts necessary for a minimum showing of the defense." (Tr. 833-834.)

Accordingly, assignment of error III is without merit. The trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANCIS E. SWEENEY, J., and

PATTON, J., CONCUR.

DAVID J. MATIA
PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellant Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

THE SUPREME COURT OF OHIO

1991 TERM

To wit: December 18, 1991

State of Ohio,	:	
Appellee,	:	Case No. 91-2020
v.	:	E N T R Y
Mitchell Burney,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58815)

THOMAS J. MOYER
Chief Justice

APPENDIX "C"

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 58611

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
-vs-	:	AND OPINION
	:	
MITCHELL BURNEY	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 1, 1991
CHARACTER OF PROCEEDING	:	Criminal Appeal from Common Pleas Court No. CR-238069
JUDGMENT	:	AFFIRMED.
	:	

DATE OF JOURNALIZATION: _____

APPEARANCES :

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APPENDIX "D"

HARPER, J:

Defendant-appellant, Mitchell Burney, was initially indicted by the Cuyahoga County Grand Jury (CR222830) on December 28, 1987. A second indictment was returned by the Grand Jury on April 17, 1989, wherein the initial drug abuse charges were raised to drug trafficking. Appellant now appeals the verdict which found him guilty of violating R.C. 2925.03 (three counts), R.C. 2925.11, R.C. 2925.13 (two counts), R.C. 2923.12, and R.C. 2923.24, as alleged in the second indictment.

I.

A.

Both indictments stemmed from drug activity which occurred on November 6, 1987, and November 13,

1987.

A joint task force was formed between agents of the Bureau of Alcohol, Tobacco, and Firearms and officers from the Cleveland Police Department in October, 1987. The purpose of the task force as to investigate narcotics and firearms violations.

A surveillance team was organized in preparation for a controlled buy scheduled to take place in November, 1987. This buy was prearranged with a middle man, codefendant William Atkinson. Special Agent Ron Carter, who was wired, purchased one ounce of cocaine from the occupants of a white BMW on November 6th. Carter identified codefendant Calvin Burney as the driver and appellant as the

passenger. No arrests were made as a result of this sale. The surveillance team monitored the transaction from mobile units.

A second prearranged controlled buy was scheduled for November 13, 1987 at Atkinson's house. The team planned on arresting the occupants of the white BMW before they arrived at the house to secure Carter's safety as an undercover agent.

Carter arrived at Atkinson's house as scheduled. Carter was informed by Atkinson that only three ounces of cocaine were available as his sources were unable to go to the "stash house". However, Atkinson told Carter that he could still purchase the cocaine for a discount price of $1,200 per ounce and that additional

cocaine would be available later that afternoon.

Carter was at the house for approximately one and one-half hours. Atkinson made several telephone calls during this time, and paged his sources to expedite the delivery.

Carter's office then paged him and told him to leave the residence. As instructed, Carter left the house. He was met by the police and arrested, as were his informant and Atkinson.

In the meantime, other members of the task force stopped the BMW at 116th Street and Melba when it was approximately three blocks from Atkinson's house. The vehicle was successfully stopped by surrounding it on three sides by unmarked police cars. Calvin Burney, the, driver at

one point attempted to back out of the blockade but stopped when order to do so. The occupants were seen to be moving in the vehicle in what was termed a "commotion" by an observing detective.

A loaded nine millimeter Browning automatic pistol was retrieved from the from bucket seats. The members of the task force also confiscated three ounces of cocaine from appellant's pocket and a pager from codefendant Calvin. The pager listed Atkinson's telephone number as the most recent caller in its liquid crystal display.

B.

The original indictment was brought against appellant on December 28, 1987 as a result of the November 6 and 13, 1987 events. Appellant's

arraignment of this indictment occurred on January 26, 1988. Appellant waived his right to a speedy trial on July 6, 1988. On August 10, 1988, a motion to suppress evidence was filed, said motion being heard and overruled by the trial court on April 4, 1989. Both parties thereafter requested that the trial scheduled for March 29, 1989 be continued; whereupon a pretrial was scheduled for April 19, 1989.

The Cuyahoga County Grand Jury returned the second indictment on April 17, 1989 in which the initial drug abuse charges were raised to drug trafficking. On May 4, appellant entered a "plea in bar", seeking a dismissal of the indictment based on denial of a speedy trial. Appellant

pled not guilty at his arraignment on May 8, 1989. The trial court subsequently nolled two counts of the indictment.

Trial by jury commenced on August 14, 1989 on the remaining eight counts. The jury returned a verdict of guilty as to these eight counts on August 25, 1989.

On September 14, 1989, the trial court sentenced appellant to a term of three (3) years to fifteen (15) years, three (3) years actual on count one; six (6) months county jail time on count two; five (5) years to twenty-five (25) years, five (5) years actual with three (3) years prior to and consecutive on gun specification on counts three and five; six (6) months on count four; one year each on the

remaining three counts. All terms were to run concurrent.

The initial indictment of December 28, 1987 was dismissed as a result of a nolle prosequi on October 2, 1989.

Appellant appeals from the within verdict and sentence. For the reasons that follow, we affirm.

II.

Appellant's first assignment of error is that:

> **"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE CHARGES THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONAL AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS STATUTORY RIGHT TO SPEEDY TRIAL UNDER R.C. 2945.71 AND 2945.73."**

There is no dispute that

appellant waived his right to a speedy trial of the initial indictment. However, he argues that this waiver did not constitute a knowing and intelligent waiver of such right as to the second indictment. Appellant, therefore, asserts that the trial court erred in not dismissing the second indictment based on appellant's denial of his right to a speedy trial.

The Sixth Amendment to the United States Constitution guarantees a defendant a right to a speedy trial. Section 10, Article I of the Ohio Constitution provides a similar provision.

A defendant's right to a speedy trial is codified in R.C. 2945.71. This statute was enacted as

> "'*** a rational effort to enforce the constitutional

> right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state.'"

State v. Packay (1980), 64 Ohio St. 2d 218, syllabus.

A.

A defendant can waive this right to a speedy trial if done so knowingly, voluntarily and intelligently. In order for a waiver to be entered voluntarily, the defendant must understand the nature of the charges against him. State v. Adams, (1989), 43 Ohio St. 3d 67, 69. The defendant must also know what is being waived as well as the extent of the waiver. Id.

The Ohio Supreme Court in State v. Adams, supra, addressed the issue

of whether a defendant's waiver of his right to a speedy trial as to an initial charge acts as a waiver of that same right to a subsequent charge. The court held that

> "'*** when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."

Id., 70. The court's reasoning behind its holding was that a knowing and intelligent waiver as to a right to speedy trial as to the subsequent indictment when the latter could involve different defenses at trial. Id., 69-70.

This reasoning applies to the within action. Thus, the original waiver as to the initial indictment

for drug abuse does not apply to the later indictment which included drug trafficking charges. See State v. Burney (1991), Cuyahoga App. No. 58611, unreported.

B.

This court, having determined that the appellant did not waive his right to a speedy trial, must now determine if he was denied said right. Appellant was charged with various felonies. Appellee was thereby statutorily required to bring appellant to trial within 270 days after his arrest:

> "(C) A person against whom a charge of felony is pending:
>
> "***
>
> "(2) Shall be brought to trial within two hundred seventy days after his arrest."

R.C. 2945.71(C)(2).

Appellant was arrested on November 13, 1987. Appellant's trial on charges set forth in the second indictment commenced on August 14, 1989. The 270 day statutory time limit was clearly exceeded as approximately 630 days elapsed between the date of arrest and the commencement of trial.

The R.C. 2945.71 time limits may be extended pursuant to R.C. 2945.72. This statute provides:

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only be the following:
>
> "****
>
> "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion,

> proceeding, or action made or instituted by the accused;
>
> "****
>
> "(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;
>
> "***"

In the case sub judice, a pretrial scheduled for February 9, 1988 was rescheduled for February 17, 1988, pretrial was once again rescheduled for March 18, 1988. The record does not indicate the cause of these continuances. These entries will not, therefore, toll the time since we cannot infer that defendant requested the continuances.

A motion to suppress evidence was filed by appellant on August 10, 1988.

The trial court denied this motion on April 4, 1989. Accordingly, 234 days were tolled when both parties requested a continuance of the trial scheduled for March 29, 1989. Appellant then made a plea in bar, moving to dismiss for lack of speedy trial; 114 days were tolled as a result since the trial court denied the motion on August 28, 1989. The total number of days tolled at appellant's request for these motions and continuances were 369.

EVENT	DATE	ELAPSED TIME
Arrest	November 13, 1987	
Motion to Suppress	August 10, 1988	
Denial of Motion to		

Suppress	April 4, 1989	234 days
Request for Continuance	March 29, 1989	21 days
Continuance granted to April 19, 1989		
Plea in bar (motion to dismiss)	May 4, 1989	
Denial of motion to dismiss	August 28, 1989	114 days
TOTAL ELAPSED TIME		**369 days**

The statutory time period set forth in R.C. 2945.71 is thereby extended 369 days. R.C. 2945.72; see, State v. Bickerstaff (1984), 10 Ohio St. 3d 62, 67. The subtraction of 369 days from the total of 261 days since appellant's arrest, 630, results in the total of 261 days. The appellant was, therefore, brought to trial within 270 day statutory time period.

Accordingly, appellant's first assignment of error is overruled.

IV.

Appellant, in his second assignment of error, asserts that:

"THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR TRAFFICKING IN DRUGS, R.C. 2924.03(A)(7) [sic]."

R.C. 2925.03(A)(7) provides in relevant part:

"(A) No person shall knowingly do any of the following:

"***

"(7) No person shall knowingly sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount."

Appellant does not deny that three ounces of cocaine were found in his pocket at the time of his arrest. However, appellant asserts that there is not a "*** scintilla of evidence to support the essential element of a

sale or offer to sell cocaine***." He argues that his conviction for count three along with the firearm specification must be vacated as the state failed to prove this essential element.

The following is the test for sufficiency of the evidence:

> "'*** [T]he test is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence." [Citations omitted.]'

State v. Davis (1988), 49 Ohio App. 3d

109, 111, quoting State v. Martin (1983), 20 Ohio App. 3d 172, 175.

In the within action, the record discloses that a rational trier of fact could find beyond a reasonable doubt the appellant knowingly sold or offered to sell cocaine from the evidence and inferences reasonably drawn therefrom. Thus, appellant's conviction was sustained by sufficient evidence.

The evidence establishes that appellant planned and communicated with Atkinson, the middleman, to sell him three ounces of cocaine on November 13, 1987. The testimony of Agent Carter corroborated this sale plan. Atkinson called his supplier when Agent Carter was present in Atkinson's house. Atkinson informed

Carter that his supplier only had three ounces of cocaine to sell rather than the originally planned four ounces. Furthermore, Atkinson testified that the appellant telephoned him on November 13, 1987 to confirm his arrival at Atkinson's house.

The evidence clearly reveals that the appellant offered to supply three ounces of cocaine to Atkinson for his customer, Agent Carter. Appellant's second assignment of error, is therefore overruled.

V.

Appellant's third assignment of error is that:

"THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION OF CARRYING A CONCEALED WEAPON OF CARRYING A CONCEALED WEAPON [SIC] AND THE FIREARM SPECIFICATIONS PURSUANT TO

R.C. 2923.12 provides that:

"(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance."

R.C. 2929.71(A) requires that the offender be "convicted of" the specification. As such, the state must prove beyond a reasonable doubt the elements of the specification. This proof is required even though the gun specification involves enhanced punishment and not a distinct crime. See State v. Broadus (1984), 14 Ohio App. 3d 443. The state must, therefore, first establish that the offender is convicted of, or pleads guilty to, a felony other than a violation of R.C. 2923.12. Second, it must be shown that the offender, while committing the felony, had on or about his person or under his control a

device which conforms to the definitions found in R.C. 2923.11(A) and (B). It follows that this device must be both a "deadly weapon" and a "firearm". See State v. Boyce (1985), 21 Ohio App. 3d 153, 154. Thus, the state must prove beyond a reasonable doubt that the firearm was operable or could have been rendered operable at the time of the offense prior to imposing an additional three years actual incarceration under R.C. 2929.71(A). State v. Rice (1990), 50 Ohio St. 3d 51.

Finally, R.C. 2923.03 reads in part as follows:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"***

"(2) Aid or abet another in committing the offense;

"(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

"***

"(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

Appellant avers that the state failed to prove he had knowledge of the weapon's presence beyond a reasonable doubt. Codefendant Calvin Burney was the owner of the weapon. Appellant asserts that Calvin carried the weapon in the glove compartment for business purposes only and "[t]here is no evidence contradicting this position." He, therefore, argues that he was wrongly convicted of carrying a concealed weapon and of the firearm specification as either a

principal offender or an aider and abettor.

Appellant's insistence that the weapon was only in the glove compartment for business reasons was indeed contradicted by Detective Zaller's testimony. Zaller testified that the gun was found in between the front bucket seats. A photograph of the gun as found was introduced into evidence. Furthermore, appellant's reliance on Calvin Burney's acknowledged ownership of the gun does not absolutely preclude finding appellant guilty of the offense of carrying a concealed weapon. "Access to a weapon not ownership is determinative of guilt". State v. Lowry (Aug. 9, 1990), Cuyahoga App. No. 59182, unreported, citing State v.

Lane, et. al. (Dec. 3, 1981), Cuyahoga App. No. 43523, unreported.

Although appellant maintains his innocence as to the weapon's charges, the circumstances present were those that a jury could reasonable conclude appellant was aware of the weapon's presence. There was testimony that appellant and Calvin were commonly driving the white BMW. They were involved in the sale of drugs and the white BMW was used to perfect the sales. Appellant knew that Calvin Burney owned the gun and carried it in the car. The gun was found in between the front bucket seats with the butt of its protruding above the seats. The appellant was seated in the front passenger seat. Appellant explained that he did not see the weapon in the

car because it was in the glove compartment. Appellant, however, recognized the gun in the photograph entered into evidence which depicted the position of the gun when found by the police. The jury could, therefore, reasonably infer that appellant was aware of the gun's presence in the car.

Detective Zaller was present during the test firing of the gun retrieved from the vehicle. He testified to the gun's operability.

The credibility of the witnesses and the weight to be afforded their testimony are matters within the province of the jury. A judgment of conviction will not be reversed by a reviewing court with the substitution of its own judgment when the record

reveals that a jury's verdict is supported by sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus.

In the case sub judice, there was sufficient evidence in support of the jury's verdict on the carrying a concealed weapon charge and of the firearm specification. The appellant knowingly had a concealed deadly weapon ready at hand (R.C. 2923.12)[1]/

1/ Although the issue of whether the gun was concealed is not present here, a "partially concealed weapon is 'concealed' within the meaning of R.C. 2923.12." State v. Almalik (1987), 41 Ohio App. 3d 101, paragraph three of the syllabus; also, State v. Jorgenson (Oct. 25, 1990), Cuyahoga App. No. 57694, unreported.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DAVID T. MATIA, P.J., CONCURS;

SPELLACY, J., CONCUR (SEE

ATTACHED CONCURRING OPINION).

SARA J. HARPER
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellant Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF
OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 58815

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	CONCURRING
v.	:	OPINION
	:	
MITCHELL BURNEY	:	
	:	
Defendant-Appellant	:	

DATE: August 1, 1991

LEO M. SPELLACY J.:

I concur with majority in affirming the conviction of defendant-appellant Mitchell Burney for four counts of drug trafficking, two counts of drug abuse felony, one count of carrying a concealed weapon, one count of possession of criminal tools, and a gun specification. I write separately, however, to address appellant's first assignment of error, the majority found that appellant's

speedy trial waiver as to his initial indictment does not apply to the later indictment pursuant to State v. Adams (1989), 43 Ohio St. 3d 67. I disagree.

In Adams, supra, the Ohio Supreme Court addressed the following issue:

> When an accused waives the right to a speedy trial as to an initial charge, can this waiver apply to a subsequently filed charge which arises out of the same facts as the former charge, when the later charge is brought after a nolle prosequi is entered as to the first charge?

Id., at 68.

Adams, supra, is limited to waivers of a defendant's right to a speedy trial when the defendant's first indictment is dismissed and then defendant is subsequently indicted for a different charge. State v. Lucey

(May 16, 1991), Cuyahoga App. NO. 58545, unreported. Adams, supra, clearly dealt with a case when the second indictment was brought after a nolle prosequi was entered as to the first indictment. Adams, supra, at 68.

In the instant case, appellant's second indictment did include different charges. However, when the second indictment was rendered, appellant's first case had not been dismissed until after appellant was tried and sentenced.

Since appellant's second indictment did not follow a nolle prosequi of his initial indictment and the second indictment arise from the same set of facts and circumstances as the first, I find that his speedy

trial waiver does apply herein. I conclude that Adams, supra, is inapplicable to this case.

Therefore, I conclude that appellant was not denied his right to speedy trial since his original waiver as to the initial indictment applies to the later indictment.

ARGUMENTS AND RULING MADE AT TRIAL COURT IN CONNECTION WITH MOTION TO DISMISS

MR. SHAUGHNESSY (ATTORNEY FOR CALVIN AND MITCHELL BURNEY):

Your Honor, that case, and I'm talking now about 222830, went -- proceeded -- as a matter of fact, started in the United States District Court for the Northern District of Ohio, which referred directly to our County Grand Jury, the Federal people having apparently declined. They usually decline if they don't have pictures, fingerprints, signed confessions and that sort of thing. In any event, they kicked it over to the good people in Cuyahoga County.

We were arraigned on January 14, 1988, and that was a multi-count indictment that reflects to some degree the same charges in the case we are about to try, if you agree with the State, Case No. 238069.

In any event, on June 28, 1988, we signed waivers of speedy trial relative to Case No. 222830, and those were indefinite, and each defendant in open court consented to this case, Case No. 222830, being continued, even if it had to be continued indefinitely, and that certainly was our posture and still is our posture with Case No. 222830.

* * *

MR. SHAUGHNESSY:

Well, it was sometime in the early part of this year you entertained motions to suppress. At that time the State of Ohio, Mark Fellenbaum representing the State, sought to amend the indictment in 222830 from a charge of drug abuse to a charge of drug trafficking, changing the code number, the number of the Ohio Revised Code, as well as bulk of the possession.

You indicated he couldn't.

The State then said, "Well, we will go back to the Grand Jury," which is the only proper way to do it, and the State did then go back to the Grand Jury, and sometime prior to the arraignment on May 4th, 1989, sought and got an indictment in the new case, and the new case being 238069

Now, when we appeared at the arraignment on May the 4th, 1989, we said a number of things, and in the motion to suppress one of the things we presented to the Judge in the arraignment room, and I thought it was necessary that we do that, instead of -- you see, we didn't enter pleas of not guilty, but we entered a plea at bar and allowed the Judge -- Judge Matia entered the plea for us, which I think is proper, and we said that the -- that as of that day, May the 4th,

that we were -- well, I forget the time --

THE COURT:

Five hundred thirty days.

MR. SHAUGHNESSY:

-- 530 days had elapsed from the date of the initial arrest, that on that day more than 530 days went by since the date of the arrest, November 12, 1987. I don't think we have to quibble about arithmetic. It's clearly beyond the time.

We further indicated and agreed that as from May 4th to whatever day you got the case back and whatever day you would have available for trial that we would waive that period. I[n] other words, we were not contesting any time after May 4th to whatever day you set it. We were contesting the time solely from November 13, 1987 to May 4, 1989.

THE COURT:

So you are either in time or out of time on the arraignment date, May 4, 1989?

MR. SHAUGHNESSY:

Absolutely, your Honor, and that's what we are asking you to dc today. Certainly the spirit of the Constitution of the United States and

the Ohio Constitution and certainly the intent of the legislature and, of course, if one -- if we confer a right on someone, one may waive that right if one wants to.

As far as the lower numbered case, your Honor, for whatever reason, we had no problem, and we had a right to be tried in 270 days on that case. We chose then, a year ago, to say "Well, we will waive that right and let the case be tried at the convenience of the Court and counsel for the State."

THE COURT:

All right. Mr. Thomas.

* * *

MR. THOMAS [COUNSEL FOR THE STATE]:

On behalf of the State of Ohio, as your Honor is aware, this case has gone through a number of prosecutors, but my understanding of the posture of the case is that the arrest dates for both files, 222830 and 238069, are, in fact, the same.

Now, Mr. Shaughnessy's argument is a cat and mouse argument. He's asking the Court that although represented by very able counsel -- well, the Court is aware that the facts underlying these charges are a series of transactions and negotiations that took place with the Cleveland police and various other agents of the

federal government and that the nature of the charges are not a surprise. The trafficking was present on the first indictment and is present on the second indictment. The amount of cocaine is present on the first indictment, and it's present on the second indictment, three times bulk.

The nature of the charges only changed as to the gun specification on the second indictment, but the gun was present and a factor in the prior indictment.

Therefore, under State -v- Clay, 9 Ohio App. 3d 216, the squib would read, "Arrest on one charge. Later indicted on several charges all arising from same transaction. Facts known to State at time of arrest. Time for trial for all charges from date of arrest on first charge."

If that works against the State, your Honor, it's also got to work against the defense. They were aware of the nature of the charges. Nothing has really changed. Therefore, that waiver applies to the reasonableness of the timing of the trial on this second indictment.

Furthermore, there has been no demonstration by the defense that there's been any impairment in the delay, and under U.S. -v- Wehling, 676 F.2d 1053, your Honor, the defendant must demonstrate impairment in the ability to defend under pre-indictment

delay.

* * *

In essence, Your Honor, what the State is saying is that there has been no impairment to the defense in the case, the charges have remained the same, and there was a valid waiver by the individual defendants and that they are bound by that waiver.

* * *

THE COURT:

All right. I have had both these cases since their inception. I understand the arguments on both sides. I believe I understand the law. I'm going to overrule the motion.

MR. SHAUGHNESSY:

All right. Thank you, sir.